A

SHERIFAH SALIM

v.

ALDY SDN BHD

B

HIGH COURT MALAYA, SHAH ALAM
ABU SAMAH NORDIN J
[CIVIL APPEAL NO: 2-12-166-97]
7 FEBRUARY 2008

C ***LANDLORD & TENANT:*** *Rent - Distress - Writ of distress - Whether irregular - Whether ought to be set aside - Distress Act 1951, s. 5*

LANDLORD & TENANT: *Rent - Arrears - Whether landlord could*
D *distrain for arrears - Whether landlord entitled to claim for rent after tenancy has been determined - Whether summary procedure by way of writ of distress wrong in law - Whether proper remedy would be to claim for damages against tenant for holding over - Civil Law Act 1956, s. 28(4)(a)*

E This was an appeal against the decision of the Sessions Court Judge dismissing the appellant's application to set aside the writ of distress issued against her at the instance of the respondent. Briefly, by a tenancy agreement the respondent agreed to let out its premises on the Ground Floor and Mezzanie Floor Ampang
F Point Selangor ('the premises') to the appellant at a monthly rental of RM5,500 for a period of three years from 1 April 1994 to 31 March 1994. Under the tenancy agreement, the appellant has the option to renew the tenancy for another two years on the same terms and conditions but at a new rent to be negotiated,
G by making a written request to the respondent not less than three months before its expiry. The appellant however failed to exercise her option to renew the tenancy agreement within the stipulated time. It was only on 1 January 1997 that she wrote to the respondent with a request to renew the tenancy for another two
H years commencing on 1 April 1997. The respondent claimed that the appellant's letter was only faxed to it on 14 January 1997 and by then it was already out of time. So by a letter dated 19 January 1997, the respondent replied that it was unable to agree to the request and advised the appellant to vacate the
I premises upon the expiry of the tenancy. The appellant nevertheless continued to occupy the premises after the expiry of

the tenancy and appealed to the respondent to allow a further extension of the tenancy agreement for another two years. The respondent did not accede to the request. As the appellant refused to vacate the premises, the respondent applied *ex parte* for a writ of distress under s. 5(1) of the Distress Act 1951 and claimed double rent amounting to RM33,000 for the months of April, May and June 1997. The appellant applied to set aside the writ of distress which was dismissed by the Sessions Court Judge who ordered that the appellant pay the arrears of double rent to the respondent from the date of the expiry of the tenancy agreement till the appellant vacated the premises. The sole issue herein was whether the respondent could distrain for arrears of double rent against the appellant for holding over, by way of a writ of distress under the Distress Act 1951 after the determination of the tenancy.

Held (allowing the appellant's appeal):

(1) The landlord could not distrain for arrears of double rent for holding over after the determination of the tenancy by way of a writ of distress under s. 5 of the Distress Act 1951. Section 5(1) speaks of 'rent due or payable'. It must be the rent due or payable under the tenancy agreement. Once the tenancy had been determined there was no further rent due or payable. The landlord was not entitled to claim for any rent thereafter, let alone double rent. The tenant who held over became a trespasser. The landlord's remedy was to claim double rent as damages against the tenant for holding over under s. 28(4)(a) of the Civil Law Act 1956. The summary procedure by way of a writ of distress adopted by the respondent was clearly wrong in law. (para 20)

Case(s) referred to:

Bah Heng Hong Sdn Bhd v. The Provisional Liquidator Choong Shin Cheong & Anor [1992] 3 CLJ 1421; [1992] 2 CLJ (Rep) 150 HC ***(refd)***

Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal [1997] 3 CLJ 504 CA ***(refd)***

Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd [1982] 1 LNS 69 ***(refd)***

May Properties Sdn Bhd v. Kong Phew Keng [1995] 1 LNS 305 HC ***(refd)***

Medfiche Sdn Bhd v. Persatuan Teknologi Malaysia [1993] 2 CLJ 345 HC ***(refd)***

Perbadanan Pembangunan Bandar v. Syabas Holdings Sdn Bhd [1990] 1 CLJ 805; [1990] 2 CLJ (Rep) 614 HC ***(refd)***

A *Soong Ah Chow & Anor v. Lai Kok Cheng [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360 FC* ***(refd)***
Wong Choon For v. Lim Chee Hooi & Ors [2002] 5 CLJ 556 HC ***(refd)***

Legislation referred to:
B Civil Law Act 1956, s. 28(4)(a)
Distress Act 1951, ss. 5(1), (3), 19

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 13, paras 901, 909, 987
RR Sethu, *Distress: An Archaic Remedy in Modern Law*, [1994] 1 MLJ cliii

C *For the appellant - Suryati (Abdullah Daud with her); M/s Nazrin Nasir T Anand & Co*
For the respondent - Rizal Zulkepli (Aida Abdul Jalil with him); M/s Abdul Malik & Lawrence Tan

D *Reported by Suhainah Wahiduddin*

JUDGMENT

E **Abu Samah Nordin J:**

[1] This was an appeal against the decision of the learned judge of the Sessions Court Ampang Selangor, dismissing the appellant's application to set aside the writ of distress issued against her at the instance of the respondent.

F

[2] Briefly the facts were as follows. By a tenancy agreement dated 24 March 1994 the respondent agreed to let out its premises at Lot 48, Ground Floor and Mezzanie Floor, Jln Mamanda 9, Ampang Point, Selangor ("the premises") to the
G appellant at a monthly rental of RM5,500 for a period of three years from 1 April 1994 to 31 March 1997.

[3] Under the tenancy agreement the appellant has the option to renew the tenancy for another two years on the same terms
H and conditions but at a new rent to be negotiated, by making a written request to the respondent not less than three months before its expiry.

[4] The appellant however failed to exercise her option to renew the tenancy agreement within the stipulated time. It was only on
I 1 January 1997 that she wrote to the respondent with a request to renew the tenancy for another two years commencing on 1

April 1997. The respondent claimed that the appellant's letter was only faxed to it on 14 January 1997 and by then it was already out of time. So by a letter dated 19 January 1997 the respondent replied that it was unable to agree to the request and advised the appellant to vacate the premises upon the expiry of the tenancy. The appellant nevertheless continued to occupy the premises after the expiry of the tenancy and appealed to the respondent to allow a further extension of the tenancy agreement for another two years. The respondent did not accede to the request.

[5] As the appellant refused to vacate the premises, the respondent applied *ex parte* for a writ of distress under s. 5(1) of the Distress Act 1951 and claimed a double rent amounting to RM33,000 for the months of April, May and June 1997.

[6] The writ of distress was issued on 30 July 1997. On 12 August 1997 the bailiff seized the appellant's movable properties. The appellant applied to set aside the writ of distress and for a stay of execution. On 22 August 1997 the learned Sessions Court Judge dismissed the application and ordered the appellant to pay the arrears of double rent to the respondent from the date of the expiry of the tenancy agreement till the appellant vacated the premises. This was notwithstanding the fact that the respondent's application for arrears of double rent was only for the months of April, May and June and not until the appellant vacated the premises.

The Issue

[7] The sole issue before the court was whether the respondent could distrain for arrears of double rent against the appellant for holding over, by way of a writ of distress under the Distress Act 1951 after the determination of the tenancy. The learned counsel for the appellant contended that the arrears of double rent for holding over could not be claimed by way of a writ of distress under the Distress Act 1951. The Act only allows the landlord to claim single rent which is due or payable. He referred to s. 5(1) and (3) of the Distress Act 1951 which reads as follows:

> 5(1) A landlord or his agent duly authorized in writing may apply *ex parte* to a Judge or Registrar for an order for the issue of a warrant, to be called a warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed

A months of the tenancy immediately preceding the date of the application and the Judge or Registrar may make such order accordingly.

(2) ...

B (3) Arrears of rent may be distrained for after the determination of the tenancy, provided that either the tenant is still in occupation of the premises in respect of which the rent is claimed to be due, or any goods of the tenant are still on the premises.

C **[8]** In *Bah Heng Hong Sdn Bhd v. The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421; [1992] 2 CLJ (Rep) 150, James Foong Cheng Yuen J said that, "The Distress Act 1951 clearly provides for claims of arrears of rental. There are no provisions whatsover therein to provide for distress or D damage". In *Wong Choon For v. Lim Chee Hooi & Ors* [2002] 5 CLJ 556 the respondents (the landlords) obtained a writ of distress for recovery of rent due. The appellant's (tenant's) application to set aside the writ of distress was dismissed by the learned magistrate. On appeal by the appellant the High Court set E aside the writ of distress on the ground that there was actually no arrears of rent due.

[9] It was submitted that the words "rent due or payable" in s. 5(1) of the Distress Act 1951 referred to rent actually due or F payable under the tenancy agreement. A claim for double rent for holding over was actually a claim for damages. Such claim could only be made under s. 28(4)(a) of the Civil Law Act 1956 by way of an action and not by a writ of distress: See *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd* [1982] 1 LNS 69 and G *Soong Ah Chow & Anor v. Lai Kok Cheng* [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360.

[10] In *Krishna Sreedhara Panicka*'s case the landlord claimed double rent under s. 28(4)(a) of the Civil Law Act 1956. The H High Court allowed the claim. Its decision was affirmed by the Federal Court. It described the phrase "double the amount of his rent" in s. 28(4)(a) of the Civil Law Act 1956 as follows:

> The respondents' claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss he I causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy.

[11] Again in *Soong Ah Chow & Anor v. Lai Kok Cheng* the landlord's claim was for double rent under s. 28(4)(a) of the Civil Law Act 1956. The tenancy had expired by effluxsion of time on 31 July 1979. As from 1 August 1979 all tenders of rental by the appellants were consistently refused by the respondent and the former were asked to vacate the premises, which they refused. The trial judge found the tenants to be trespassers and ordered them to pay double rent. Their appeal to the Federal Court was dismissed.

[12] The respondent justified its claim for double rent under the writ of distress by relying on *Medfiche Sdn Bhd v. Persatuan Teknologi Malaysia* [1993] 2 CLJ 345, *Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal* [1997] 3 CLJ 504; and *Krishna Sreedhara Panicka* and *Soong Ah Chow & Anor* which were referred to earlier. It must be noted that except for *Medifiche Sdn. Bhd*, the other cases relate to claims by way of civil action for double rent under s. 28(4)(a) of the Civil Law Act 1956 for holding over after the determination of the tenancies and not by way of writs of distress.

[13] *Medfiche Sdn Bhd* was referred to me as authority that the landlord could claim double rent for holding over after the expiry of the tenancy by way of a writ of distress. The High Court in that case held that a claim for double rent was recoverable up to the time the tenant vacated the premises by virtue of s. 28(4)(a) of the Civil Law Act 1956.

[14] The learned counsel for the appellant pointed out that the decision in *Medfiche Sdn Bhd* was erroneously decided. He referred to an article by RR Sethu, titled, *"Distress: An Archaic Remedy in Modern Law"* [1994] 1 MLJ cliii. The writer was of the view that "the sum provided in s. 28(4)(a) of the Civil Law Act 1956 is not the contractual rent. The sum is not an agreed rent. It is not the consideration for the use and enjoyment of the land with the consent of the landlord but it is a penalty for failure to quit when the tenancy had been determined".

[15] The other case in which the High Court allowed the landlord's claim for double rent by way of a writ of distress was *May Properties Sdn Bhd v. Kong Phew Keng* [1995] 1 LNS 305. In that case the notice to terminate the tenancy came into effect on 1 December 1992. The tenant continued to remain in possession.

The magistrate dismissed the claim for double rent for the month of December 1992. On appeal by the landlord, the High Court allowed the landlord's claim for double rent in view of s. 28(4)(a) of the Civil Law Act 1956 and that the tenancy agreement itself provided that the rental was payable in advance. Although the tenancy had terminated at the end of November, the High Court held that the payment of rental in advance at the beginning of December would be applicable "since to hold otherwise would be inequitable as it would improve the payment terms of a tenant who ignores termination of tenancy".

[16] In that case there was however no challenge on the legality of the writ of distress as the tenant acted in person and was not represented. The Federal Court's decision in *Krishna Sreedhara Panicka*'s case that double rent under s. 28(4)(a) of the Civil Law Act 1956 was not in fact rent due or payable but a penalty in the form of damages, was not brought to its attention.

[17] Distress is a summary remedy for the non-payment of rent. The term 'distress' primarily connotes a summary remedy by which a person is entitled without legal process to take into his possession the personal chattels of another person, to be held as a pledge to compel the performance of a duty, or the satisfaction of a debt or demand: see *Halsbury's Laws of England*, 4th edn vol. 13 para 901. Bradby *Law of Distress* (2nd edn) defines distress as follows:

> A distress is the taking of a personal chattel, without legal process, from the possession of a wrongdoer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand.

[18] It is an archaic remedy at common law which had found its way into our statute, namely the Distress Act 1951. At common law the chattels remained only as a pledge in the hands of the party making the distress and could not be sold: see *Halsbury's Laws of England, supra,* para 909. In order that the right to distrain for rent upon a demise may arise, the relation of landlord and tenant must exist, both when the rent becomes due and when the distress is levied, and the rent must be in arrear: *Halsbury's Laws of England supra,* at para 987; *Perbadanan Pembangunan Bandar v. Syabas Holdings Sdn Bhd* [1990] 1 CLJ 805; [1990] 2 CLJ (Rep) 614.

[19] In Malaysia this common law remedy had been modified in a number of ways by the Distress Act 1951. For instance the property seized under a warrant of distress can now be sold and the proceeds be utilised to satisfy the rent due: see s. 19 of the Distress Act 1951.

[20] Upon a careful reading of the cases cited to me and s. 5 of the Distress Act 1951 and after considering the submissions of the learned counsel for both parties, I was of the considered view that the landlord could not distrain for arrears of double rent for holding over after the determination of the tenancy by way of a writ of distress under s. 5 of the Distress Act 1951. Section 5(1) speaks of "rent due or payable". It must be the rent due or payable under the tenancy agreement. Once the tenancy had been determined there was no further rent due or payable. The landlord was not entitled to claim for any rent thereafter, let alone double rent. The tenant who held over became a trespasser. The landlord's remedy was to claim double rent as damages against the tenant for holding over under s. 28(4)(a) of the Civil Law Act 1956. The summary procedure by way of a writ of distress adopted by the respondent was clearly wrong in law.

[21] There is no provision in the Distress Act 1951 enabling the landlord to distrain for arrears of double rent for holding over after the determination of the tenancy agreement. A possible exception is where the tenant (not the landlord) gives notice of his intention to quit but does not deliver up possession accordingly. This is explained in para 987, *Halsbury's Laws of England*, *supra*, as follows:

> There is one instance in which the law allows the landlord to distrain for double rent, and that is when the tenant gives notice of his intention to quit the premises at a particular time, and does not deliver up possession accordingly; he then becomes liable to pay the landlord double the former rent for the whole time he holds the premises after the expiration of such notice. Such double rent may be levied and recovered as the former single rent might have been.

[22] For the said reasons, I allowed the appellant's appeal with costs.